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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1067

REGENCY ELECTRONICS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, CLC,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Regency Electronics, Inc. (the "Company"), requests that a Writ of Certiorari issue to review the judgments of the United States Court of Appeals for the Seventh Circuit rendered in the above case on December 3, 1973, and October 3, 1975.

OPINIONS BELOW

The decision of the Regional Director of the National Labor Relations Board (the "Board") which set aside the results of the first representation election at the Company's manufacturing plant is unreported. A copy is reprinted at page 1 of the Appendix ("App.") which has been separately filed with this petition. The decision of the Board which

adopted the Regional Director's decision and ordered that a second election be conducted is unreported. (App. 17)

The decision of the Regional Director which upheld the results of the second election at the Company's plant is unreported. (App. 21) The decision of the Board which adopted the Regional Director's decision is reported at 198 N.L.R.B. No. 87 (1972). (App. 36) The decision of the Board which ordered the Company to cease and desist from refusing to bargain with the certified union, one of the Respondents herein, is reported at 200 N.L.R.B. No. 88 (1972). (App. 39)

The opinion of the Court of Appeals which denied the Company's petition for review and granted enforcement of the Board's cease and desist order is reported at 499 F. 2d 1129 (7th Cir., 1973) (App. 53) (*"Regency I"*). The order of the Court of Appeals which stayed further proceedings and remanded the case to the Board for further findings is reported at 499 F. 2d 1134 (7th Cir., 1974). (App. 64)

The Supplemental Decision of the Board's Administrative Law Judge is unreported. (App. 66) The Supplemental Decision and Order of the Board which adopted the decision of the Administrative Law Judge is reported at 215 N.L.R.B. No. 157 (1974). (App. 82)

The opinion of the Court of Appeals which enforced the Board's supplemental order is reported at 523 F. 2d 522 (7th Cir., 1975) (App. 84) (*"Regency II"*).

JURISDICTION

The first judgment of the Court of Apepals is dated December 3, 1973, and was entered on January 29, 1974. By order dated March 14, 1974, the Court of Appeals stayed further proceedings and remanded the case to the Board.

The second judgment of the Court of Appeals is dated October 3, 1975, and was entered on November 14, 1975. The petition for rehearing filed by the Company was denied on October 30, 1975, and this petition was filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §§1254(1) and 2101(c) (1975).

QUESTIONS PRESENTED

1. Did the Board contravene the mandates of the Administrative Procedure Act and the decisions of this Court by setting aside the results of a representation election based solely upon a pre-existing, but unpromulgated, general rule?

2. Alternatively, should enforcement of a Board order be denied if the order was founded on a mechanical use of Board precedent and if the Board did not independently consider the facts of the case or otherwise supply any reasoned basis for its order?

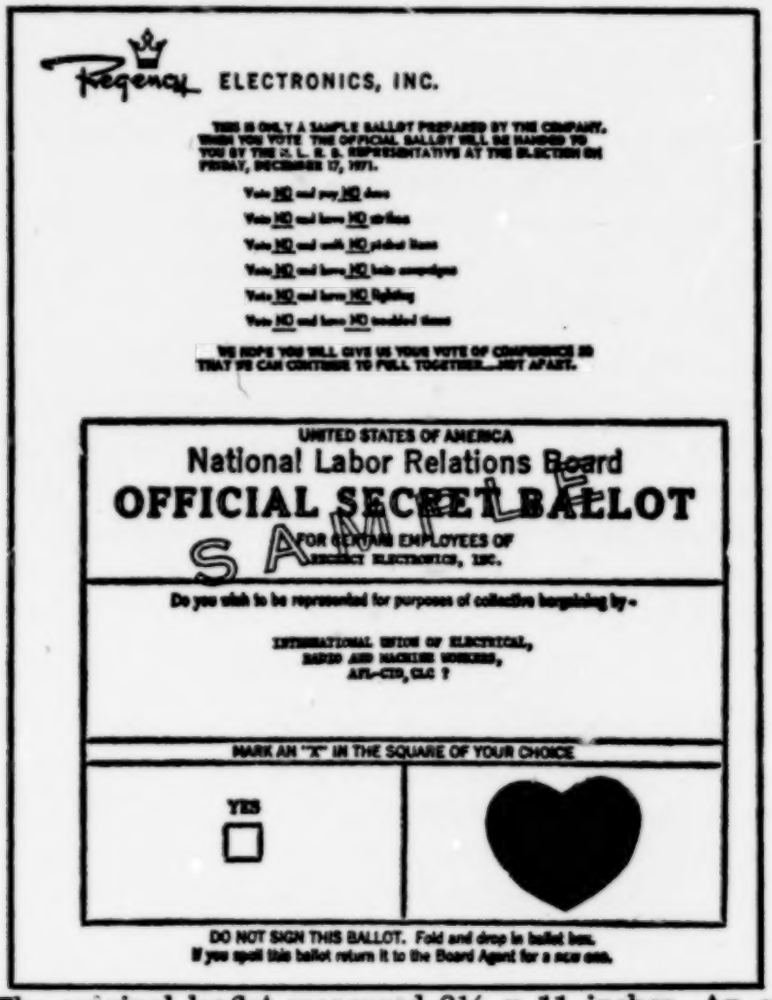
3. Should the Board have set aside the results of a subsequent representation election in which the union prevailed by only 21 votes, if at the time of the election, the union was continuing to benefit from the fact that approximately 50 of the 245 voting employees held charter membership cards which contained improper waivers of initiation fees?

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act (the "NLRA"), 29 U.S.C. §§141-187 (1975) are set forth in the separate Appendix at page 99. The relevant provisions of the Administrative Procedure Act (the "APA"), 5 U.S.C. §§500-706 (1975) are set forth in the separate Appendix at page 93.

STATEMENT OF THE CASE INCLUDING BASIS FOR FEDERAL JURISDICTION

The Company manufactures electronic equipment at Indianapolis, Indiana. On December 17, 1971, the Board conducted an election to determine whether the Company's employees wished to be represented for purposes of collective bargaining by the Respondent, International Union of Electrical, Radio and Machine Workers, AFL-CIO, CLC (the "Union"). During the election campaign, the Company distributed the following leaflet:


Regency ELECTRONICS, INC.

THIS IS ONLY A SAMPLE BALLOT PREPARED BY THE COMPANY. WHEN YOU VOTE THE OFFICIAL BALLOT WILL BE HANDED TO YOU BY THE N. L. R. B. REPRESENTATIVE AT THE ELECTION ON FRIDAY, DECEMBER 17, 1971.

Vote NO and pay NO dues

Vote NO and leave NO strikes

Vote NO and walk NO picket lines

Vote NO and leave NO hate campaigns

Vote NO and leave NO fighting

Vote NO and leave NO troubled times

WE HOPE YOU WILL GIVE US YOUR VOTE OF CONFIDENCE SO THAT WE CAN CONTINUE TO PULL TOGETHER....NOT APART.

UNITED STATES OF AMERICA
National Labor Relations Board
OFFICIAL SECRET BALLOT
SAMPLE
FOR CERTAIN EMPLOYEES OF REGENCY ELECTRONICS, INC.

Do you wish to be represented for purposes of collective bargaining by -

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, CLC ?

MARK AN "X" IN THE SQUARE OF YOUR CHOICE

YES ☐

DO NOT SIGN THIS BALLOT. Fold and drop in ballot box.
If you spoil this ballot return it to the Board Agent for a new one.

(The original leaflet measured 8½ x 11 inches. An exact reproduction appears at page 7 of the separate Appendix.)

A majority of the employees (117 to 104) voted against the Union. The Board set aside the results of this election and ordered that a second election be held (App. 19) solely because the Company's leaflet purportedly violated a general rule announced by the Board in the adjudicatory proceeding of *Allied Electric Products, Inc.*, 109 N.L.R.B. 1270 (1954). (App. 3-4, 19) The *Allied* rule prohibits the marking of any Board document, or any reproduction of a Board document, except in limited situations. Although consistently applied as a general rule, the *Allied* rule has never been promulgated pursuant to the rule making provisions of the APA, 5 U.S.C. §553 (1975). (App. 96)

A second election was conducted by the Board on March 24, 1972, and the Union received a majority of the votes cast (133 to 112). The Company objected to the second election alleging, *inter alia*, that the Union had improperly waived its initiation fees during the election campaign. (App. 23-24) The Board overruled all of the Companys' objections without a hearing and certified the Union as the collective bargaining representative of the Company's employees in the appropriate bargaining unit. (App. 36-38)

The Company petitioned the Court of Appeals for the Seventh Circuit for a review of the Board's order that the Company bargain with the Union and the Board cross-applied for enforcement of its order.[1] The jurisdiction of the Court of Appeals was invoked under Sections 10(e) and (f) of the NLRA, 29 U.S.C. §160(e) and (f) (1975). (App. 102-104)

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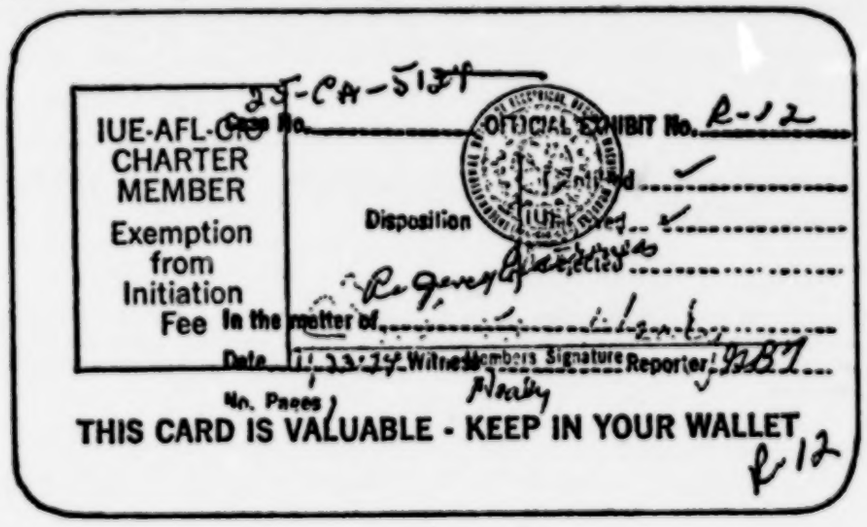
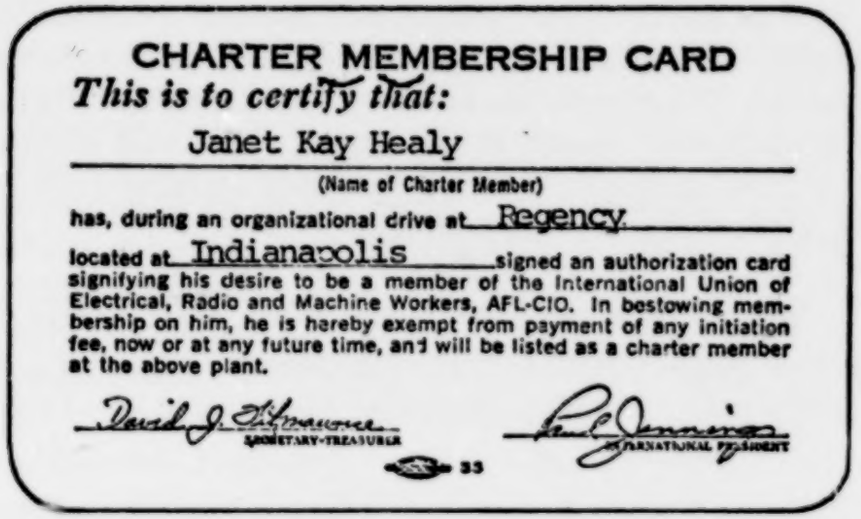
1 In order to seek judicial review of the Union's certification, the Company refused to bargain with the Union. The Board's subsequent order to cease and desist from refusing to bargain with the Union was the agency's first final order which could be judicially reviewed.

The Court of Appeals denied the Company's petition for review and granted enforcement of the Board's order even though the *Allied* rule had not been promulgated pursuant to the APA and even though the Board had based its order on a mechanical use of Board precedent. Although these Board errors were argued by the Company to the Court of Appeals, they were not discussed in the Court's opinion. (App. 53)

While the Company's petition for rehearing was pending before the Court of Appeals, this Court rendered its decision in *NLRB v. Savair Manufacturing Co.*, 414 U.S. 270 (1973). Because the Company's fourth objection to the second election had raised issues identical to those in the *Savair* decision, the Court of Appeals stayed further proceedings and remanded the case to the Board for the purpose of conducting a hearing on the Company's fourth objection. (App. 64-65)

During the subsequent hearing before the Board's Administrative Law Judge (the "ALJ"), the uncontroverted evidence established that as many as 50 (523 F.2d at 524) (App. 87) of the following "charter membership cards" were distributed to the Company's employees by the Union during the campaign prior to the first election:





CHARTER MEMBERSHIP CARD

This is to certify that:

Janet Kay Healy

(Name of Charter Member)

has, during an organizational drive at Regency

located at Indianapolis signed an authorization card signifying his desire to be a member of the International Union of Electrical, Radio and Machine Workers, AFL-CIO. In bestowing membership on him, he is hereby exempt from payment of any initiation fee, now or at any future time, and will be listed as a charter member at the above plant.

David J. Thaxton
SECRETARY-TREASURER

Paul Jennings
INTERNATIONAL PRESIDENT

IUE 33

(Facsimiles of the card appear at App. 75, 86-87)

Although the ALJ found the Union's use of the charter membership cards constituted "misconduct" (App. 78), he nevertheless recommended that the Company's fourth objection be overruled. (App. 80-81) He did so on the basis of one question and answer contained in a Union leaflet distributed to all employees over three months after the Union had bestowed charter memberships on approximately 50 employees.[2] (App. 77-78) The Board adopted the ALJ's recommended order. (App. 82-83)

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2 The ALJ's decision was also based upon the Board's cutoff date policy which at that time precluded the consideration of any conduct prior to the first election except as background. The Board admits, and subsequent to the ALJ's decision held, that the cutoff policy should not be applied to Savair violations. Gibson's Discount Center, 214 N.L.R.B. No. 22 (1974). However, the Board took the position in this case, which was accepted by the Court of Appeals in Regency II, that the ALJ's error of law in honoring the cutoff policy did not preclude adoption of his recommended order. The Board argued that one basis for the ALJ's decision was that he gave full weight to all of the evidence, including the charter membership cards, but still found the Union's conduct unobjectionable under Savair. The Company's continued challenge to such an interpretation of the ALJ's decision is not material to this petition. The undermining of Savair in Regency II is even more egregious if it is presumed the Board's cutoff policy was not applied to the facts of this case.

The Court of Appeals granted enforcement of the Board's supplemental order. The Court of Appeals did not discuss how the Union could be absolved of its admitted *Savair* violations even though at the time of the second election, it was continuing to derive the benefits accruing from its improper waiver of initiation fees.

REASONS FOR ALLOWANCE OF THE WRIT

I. The Decision of the Court of Appeals in *Regency I* is in Direct Conflict with Applicable Decisions of this Court.

In *Regency I*, the Court of Appeals sanctioned the Board's historical refusal to follow the rule making provisions of the APA.[3] The Court of Appeals also sanctioned the Board's mechanical use of Board precedent which, in the absence of a validly promulgated rule, allowed the Board to enter its order in this case without independently considering the facts and without supplying any reasoned basis for its order.

The practical effect of *Regency I* is that the Board will continue to disregard election results based upon unlawful rules on which the public has never had an opportunity to comment and of which the public has never been notified. Clearly, settlement of these issues by this Court is in the public interest in order to protect the secret ballot process by which employees select or reject a union as their collective bargaining representative.

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3 In NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969), this Court noted that:

"The Board has never utilized the [Administrative Procedure] Act's rule-making procedures." (394 U.S. at 765 n.3)

Four years later, in Bell Aerospace Co. Div. of Textron, Inc. v. NLRB, 475 F.2d 485 (2nd Cir., 1973), *modified*, 416 U.S. 267 (1974), Judge Friendly asked the Board's counsel to advise the court in writing whether the Board "had ever engaged in the rule-making on substantive matters." In reply, the Board cited only two occasions. (475 F.2d at 495 n.14)

A. The Board Cannot Adopt a General Rule, Such as the *Allied* Rule, Without Complying with the Administrative Procedure Act.

Whenever an administrative agency exercises its quasi-judicial power, as in this case, at least two steps are involved in its deliberative process. One, did the respondent commit a given act? Two, did the act violate some law? Administrative agencies need not decide the second question, however, if the agency, in the exercise of its quasi-legislative power, has previously promulgated, pursuant to the APA, a rule of general applicability which applies to the facts under consideration. General rules thus can serve to streamline the deliberative process because in an appropriate case, the agency need only determine whether the respondent committed a certain act. The fact that the act, if committed, violates the law has already been determined by rule making. Agency precedents, on the other hand, merely aid the agency in determining whether a certain act violates some law. Agency precedents cannot be used to avoid the necessity of deciding the second step.

Whether to proceed by rule making or by the use of precedents rests in the informed discretion of the agency. Only the agency knows whether it is practical to devise a general rule to fit all situations. If an agency decides to proceed by ad hoc litigation, utilizing precedents, its decision will be upheld only so long as it follows the two step deliberative process. *See, NLRB v. Bell Aerospace Company Division of Textron, Inc.*, 416 U.S. 267, 294-95 (1974); *SEC v. Chenery Corp.*, 332 U.S. 194, 202-203 (1947); and *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941).

If, however, an agency does devise a general rule, it may

do so only by following the rule making provisions of the APA. *NLRB v. Wyman-Gordon Co., supra* at 765 n.4. It is only in this manner that the public interest can be served because the public is notified of the rule and given an opportunity to comment on the proposed rule before it is implemented.

This Court has consistently recognized this public interest and refused to sanction any agency rule of general applicability which has not been promulgated pursuant to the APA. In *Wyman-Gordon*, this Court was asked to rule upon the validity of the Board's *Excelsior* rule which requires employers to furnish the Board with a list of its employees' names and addresses prior to a Board conducted election. The Board had announced the rule in the case of *Excelsior Underwear Inc.*, 156 N.L.R.B. 1236 (1966) but had never promulgated the rule pursuant to the APA. A majority of the Justices agreed that the *Excelsior* rule had been invalidly promulgated. However, a plurality of the Justices upheld the application of the rule to the Wyman-Gordon Company because the company had been presented with an order based on the *Excelsior* rule *before* it had acted in violation of the rule. (394 U.S. at 766)

The question which was not presented in *Wyman-Gordon* is what if a party is presented with a pre-existing, unpromulgated agency rule *after* it has already acted in violation of the purported rule? As the Company argued to the Court of Appeals in *Regency I*, there could be but one answer. This Court supplied that answer in *Morton v. Ruiz*, 415 U.S. 199 (1974), decided after *Regency I*.

In *Ruiz*, the respondents were Indians who had moved from a reservation to a location near the reservation. They

subsequently applied for special assistance benefits from the Bureau of Indian Affairs ("BIA"). The BIA denied the application based on a pre-existing, but unpromulgated, general rule, contained in the BIA's policy manual, limiting benefits to Indians living on, but not near, a reservation. Although the rule had been in the policy manual for a number of years, it had never been promulgated pursuant to the APA. A unanimous Court ruled that if the BIA could deny benefits to off-reservation Indians, it could only do so if a general rule to that effect was promulgated pursuant to the APA. Because the BIA had merely inserted the rule in its policy manual, this Court refused to sanction the rule. (415 U.S. at 230-36)

Wyman-Gordon, as supplemented by the *Ruiz* decision, is dispositive of this case. Both cases reflect this Court's continuing concern over the failure of administrative agencies to follow the rule making provisions of the APA. Despite *Wyman-Gordon*, the Board in this case applied a general rule which had never been promulgated pursuant to the APA. As in *Ruiz*, the unpromulgated rule was applied against the Company and its employees *after* the Company had distributed its campaign leaflet. The Board previously had announced the *Allied* rule as one to be applied in the future:

> "Upon consideration, the Board has decided that *in the future* it will not permit the reproduction of any document purporting to be a copy of the Board's official ballot, other than one completely unaltered in form and content and clearly marked sample on its face, and upon objection validly filed, will set aside the results of any election in which the successful party has violated this *rule*.[7]

"'[A]lthough we have chosen this decision in which to enunciate the *new rule* relating to sample ballots, set forth above, the *rule* is not necessarily retroactively applied to the facts of this case, as the altered ballot is objectionable under the principle of *Anderson Air Activities, supra.*" (109 N.L.R.B. at 1272) (footnote 6 omitted) (emphasis added)

This is a "rule" as defined in the APA:

"'Rule' means the whole or a part of an agency *statement* of general or particular applicability and *future effect* designed to implement, interpret, or prescribe law or policy . . ." [5 U.S.C. §551(4) (1975)] (emphasis added) (App. 94)

One year later, the Board twice confirmed that the *Allied* rule was a rule of general applicability. *Superior Knitting Corp.*, 112 N.L.R.B. 984, 986 (1955); 20 NLRB Ann. Rep. 62 (1955).

The *Allied* rule was applied as a general rule to the Company's campaign leaflet. This is evident from the following "finding" of the Regional Director which was adopted by the Board:

"The ballot set forth on Exhibit A [the Company's leaflet] is identical in size and content with the official election ballot. The *rule* set forth in *Allied Electric Products, Inc.*, 109 NLRB 1270 is therefore applicable and Exhibit A is objectionable. . . .

"[T]he Board has not modified the *Allied Electric rule.*" (emphasis added) (footnote omitted) (App. 3-4)

Unlike the *Wyman-Gordon* case where the employees' rights were only indirectly affected, the application of the *Allied* rule has resulted and will continue to result in the sweeping aside of secret ballot elections, both favorable and

unfavorable to unions.[4] This has occurred on the basis of a rule on which the public has never had an opportunity to comment and of which the public has never been notified. Had the Board followed the rule making provisions of the APA, the public could have commented on the *Allied* rule and perhaps the Board would have found it was not a repository "of ultimate wisdom." *Wyman-Gordon*, 394 U.S. at 777-78 (Douglas, J., agreeing as to the invalidity of the *Excelsior* rule but dissenting as to the result). Unless this Court directs the Board to follow the *Ruiz* decision, the Board will ignore *Ruiz* in the same manner it has consistently ignored *Wyman-Gordon.*

B. The Board Failed to State the Basis for its Order or Make Sufficient Findings.

The Court of Appeals in *Regency I* condoned a Board practice condemned by this Court in the case of *Phelps Dodge Corp. v. NLRB, supra. Phelps Dodge* established that the Board, or any administrative agency, cannot substitute

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4 *Compare, e.g.*, Superior Knitting Corp., *supra*, (election set aside because employer marked a sample ballot in employees' presence during a campaign speech) and DeVilbiss Co., 114 N.L.R.B. 945 (1955) (election set aside even though, after having marked a sample ballot, employer told employees he had not meant to infer the Board supported the employer and stated that the Board is perfectly impartial); *with*, United States Gypsum Co., 124 N.L.R.B. 1026 (1959) (election set aside because a union stuck propaganda pins, which were intended to be removed and worn, on a ballot and some of the pins were in the "Yes" box); Sharco Mfg. Corp., 110 N.L.R.B. 2112 (1954) (union's victory set aside even though other parties to the election also had distributed a marked sample ballot); Hughes Tool Co., 119 N.L.R.B. 739 (1957) (one union's victory set aside even though, as in this case, the marked sample ballot was surrounded by other propaganda and thus obviously was not an official Board document); and Tube Reducing Corp., 110 N.L.R.B. 1080 (1954).

Whatever the result of the election being set aside, be it favorable or unfavorable to a union, Mr. Justice Jackson's dissenting opinion in NLRB v. A. J. Tower Co., 329 U.S. 324 (1946) provides an appropriate reminder:

"If the only interest affected were the complaining employer and the victorious union, I should agree with the Court's decision. But there is a third and, as usual, a forgotten interest here—those employees who did not want to be represented by the union." (329 U.S. at 335)

a mechanical use of agency precedent for the second step in the deliberative process discussed above. The Phelps Dodge Corporation had discriminatorily discharged a number of employees. The Board ordered reinstatement of all the discharged employees including those who had obtained substantially equivalent employment. The only basis given by the Board for its reinstatement order was the citation of a prior Board decision. This Court remanded the case with the following admonition:

> "The only light we have on the Board's decision in this case is its statement that, if any of the workers discriminated against had obtained substantially equivalent employment, they should be offered employment 'for the reasons set forth in' Re Eagle-Picher Min. & Smelting Co. 16 NLRB 727, 833.
>
> * * *
>
> "The administrative process will best be vindicated by clarity in its exercise. . . . All we ask of the Board is to give clear indication that it has exercised the discretion with which Congress has empowered it." (313 U.S. at 196-97)

Even if this Court determines the Board applied *Allied* merely as a precedent, the Board failed to make the analysis required by *Phelps Dodge*. The Board did not determine whether the Company's leaflet tended to have an impact on the employees' vote. Rather, the Board mechanically applied Board precedent with no reasoned basis for its order by adopting the Regional Director's statement that:

> "The rule set forth in *Allied Electric Products, Inc.* 109 NLRB 1270 is therefore applicable and Exhibit A [the Company's leaflet] is objectionable." (App. 4).

This type of "finding" has no place in the just and orderly administration of the NLRA. Clarity in administrative decisions is the only method by which private parties can be fairly treated and the public interest fully served.

Regency I is a dangerous precedent. The Court of Appeals for the Seventh Circuit countenanced two Board practices in direct conflict with applicable decisions of this Court. At least in the Seventh Circuit, the Board is now free to announce and apply general rules without promulgating them pursuant to the APA. The Board is also free, in the absence of a validly promulgated rule, to continue rendering decisions founded upon a mechanical use of Board precedent without considering the facts of the particular case before it and thus without determining whether its order in a particular case effectuates the policies of the NLRA.

II. The Decision of the Court of Appeals in *Regency II* is in Direct Conflict with an Applicable Decision of this Court.

In *Regency II*, the Court of Appeals for the Seventh Circuit approved a contingent waiver of initiation fees in direct conflict with this Court's decision in *NLRB v. Savair Manufacturing Co.*, 414 U.S. 270 (1973). In *Savair*, this Court proscribed pre-election waivers of initiation fees by unions granted only to those employees who join the union before the election. The Court based its decision on the fact that, among other things, such a contingent waiver of initiation fees has the effect of: (1) buying union endorsements which paint a false portrait of employee support; and (2) causing employees who sign an authorization card possibly to feel some moral obligation to vote for the union. (417 U.S. at 277-78)

In the present case, the Union directly violated *Savair* by distributing charter membership cards[5] to the Company's employees. (App. 75, 86-87). The card speaks for itself. If an employee signs an authorization card "during an organizational drive" (and thus before, not after, the election), the employee is "exempt from payment of any initiation fee." The ALJ even admitted that the distribution of these cards constituted Union "misconduct." (App. 78)

The Court of Appeals enforced the Board's order in spite of the Union's misconduct because the Union mentioned its initiation fee policy in a campaign leaflet distributed to the employees approximately three months after it had distributed the charter membership cards. This leaflet did nothing, however, to purge the Union's *Savair* violation. First, the leaflet did not mention charter memberships.[6] Second, the leaflet was not aimed at employees who had already joined the Union[7]. Third, and most important, the Union did not divest itself of the benefits which continued to accrue from its unlawful waiver. Even after the leaflet was distributed there were still as many as fifty charter members voting in an election which the Union won by only 21 votes. Those charter members continued to: (1) paint a false portrait of employee support; and (2) still possibly feel some moral obligation to vote for the Union.

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5 *Cf.*, Inland Shoe Mfg. Co., Inc., 211 N.L.R.B. No. 73 (1974) and D.A.B. Industries, Inc., 215 N.L.R.B. No. 96 (1974).

6 The question and answer in the Union's leaflet relied upon by the ALJ state:
Question: Will I have to pay an initiation fee if the union is voted in?
Answer: Absolutely not! Anyone presently working at Regency is hereby guaranteed that they will not pay any initiation fee. (App. 77)

7 Whereas the charter membership cards were given only to a select group of employees, the Union's leaflet was mailed to all the employees for the sole purpose of soliciting new Union supporters. This is apparent from an examination of the question and answer which immediately preceded the question and answer set forth in note 6:
Question: If I haven't signed a union card can I still vote yes to have a union?
Answer: Yes you can. Signing a card has nothing to do with how you vote. Your vote will be cast in secret and you can vote yes regardless of whether or not you signed a card. (Company's hearing exhibit 6)

The benefits derived from the Union's *Savair* violations remained undiminished at the time of the second election. Fifty of the Company's employees held "VALUABLE" charter membership cards providing an exemption from initiation fees for those employees who had joined the union "during an organizational drive." The Union had done nothing to divest itself of the benefits accruing from the improper economic inducement which it had bestowed upon those fifty employees. The facts in this case are more demanding than those in *Savair* for requiring the setting aside of an election.

Regency II conflicts with and severely undermines this Court's decision in *Savair*.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this petition for a writ of certiorari be granted.

Respectfully submitted,

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